U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

MAILED: 11/16/2000

IN THE MATTER OF:	*	
Charles Deal	*	
Claimant	*	Case No.: 2000-LHC-0291
Against	*	OWCP No.: 1-99463
General Dynamics Corporation	*	
Employer/Self-Insurer	*	

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The formal hearings were held on December 8, 1999 and January 25, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, JX for a Joint exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 11A	Attorney Robert's letter letter filing copies of CX 10 and CX 11, documents admitted into evidence as limited exhibits at the hearing.	12/20/99
RX 14	Notice relating to the taking of Claimant's supplemental testimony on February 25, 2000	02/25/00
RX 15	Attorney Oberlatz's letter filing the	05/04/00
RX 16	Supplemental Testimony of the Claimant	05/04/00
ALJ EX 7	This Court's **ORDER** granting extension of time for the parties to file their briefs	05/05/00
RX 17	Attorney Quay's letter requesting an extension of time for the parties to file their post-hearing briefs	06/07/00
ALJ EX 8	The request was granted	06/07/00
CX 12	Attorney Robert's letter filing	06/20/00
CX 13	Claimant's brief	06/20/00
CX 14	Attorney Robert's letter requesting that the record be closed	07/26/00
RX 18	Employer's brief	09/01/00
CX 15	Attorney Roberts' letter	09/18/00

objecting to the Employer's late-filed brief[1]

The record was closed on September 18, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On February 2, 1987 Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on April 21, 1999.

7. The applicable average weekly wage is $502.90.

8. The Employer voluntarily and without an award has paid temporary total compensation from October 29, 1987 through November 3, 1987 at the weekly rate of $335.26, for a total of $143.68.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability from January 6, 1995 forward.

2. Whether any such disability is causally related to his maritime employment.

3. The Employer's entitlement to a credit for benefits paid to Claimant from January 29, 1999 through September 24,

[1] The objections are overruled as the record had not been closed as of that date.

1999 with reference to another claim.

4. Claimant's entitlement to medical benefits and interest on any unpaid compensation benefits awarded him.

Summary of the Evidence

Charles R. Deal, fifty-six (56) years of age, with a high school education and an employment history of manual labor, began working on November 11, 1980 as a welder at the Quonset Point facility of the General Dynamic Corporation ("Employer") a maritime facility adjacent to the navigable waters of the Narrangansett Bay and the Atlantic Ocean where the Employer fabricates and builds components and sections of a submarine which are then transported by ocean - going barges to the Employer's shipyard in Groton, Connecticut where the components and sections are then installed on the submarines. As a welder Claimant worked primarily in the tanks where he would "go in and weld whatever they wanted welded." In the performance of his duties, Claimant used various air-powered or pneumatic vibratory tools such as "grinders, burr tools," Claimant remarking that he used these tools to "prep" a weld by back gouging or grinding to smooth the metal surfaces of the boats and that he spent about fifty (50%) percent of his time using pneumatic tools. Claimant was initially described as a production welder and then as a structural fabrication welder but these were merely job title changes and his duties remained the same. (TR 54-55; JX 1 at 3-10; RX 1)

On February 2, 1987, Claimant was working in assembly building 1 in a tank being fabricated there and injured his right wrist as he attempted to lift a heavy steel plate. He reported the injury to his supervisor who gave his a pass to leave the work area and to go to the Employer's Yard Hospital where ice packs were applied to his right wrist and he was told to see his own doctor if the symptoms persisted. (JX 1 at 10-11; RX 1)(CX 2 at 1) He returned to the Yard Hospital and ice packs were again applied on February 6, 1987 for his right wrist synovitis. (CX 2 at 2) The symptoms continued and he returned to the Yard Hospital as needed for physical therapy, heat treatments and other conservative measures. (CX 2 at 3 through 29). He continued to work and finally he decided to see his own doctor, Michael J. Infantolino, M.D., and the examination took place on April 14, 1987. The doctor, reporting that "x-rays reveal an old osteochondrama of the distal radial side of the ulna, "gave his impression as right wrist tendinitis and prescribed a canvas wrist splint, Advil and a continuation of his ultrasound therapy. (RX 4-1) Claimant continued to go to the Yard Hospital as needed (CX 2 at 30-36) and he returned to see Dr. Infantolino on May 5, 1987 and the doctor prescribed a bone scan and "light duty activities only." (RX 4-1)

Claimant continued to go to the Yard Hospital as needed for his right wrist problems and he still carried a working diagnosis of tendinitis. (CX 2 at 37-43) He next saw Dr. Infantolino on June 4, 1987, at which time the doctor reported

that the bone scan showed “some arthritic changes especially around the lunate.” Claimant refused an injection to the affected area and the doctor prescribed Naprosyn. (RX 4-1) The light duty restrictions were continued (CX 2 at 44) and, as the symptoms continued, Claimant agreed to an injection in the right wrist area on June 25, 1987. Dr. Infantolino continued to diagnose the symptoms as due to “a chronic aggravated synovitis and mild arthritis in the right wrist dorsally” and, as of July 9, 1987, the doctor opined that Claimant “should permanently be on light duty activities.” (RX 4-29; CX 2 at 45)

Dr. Infantolino reported that Claimant’s “right wrist (was) aggravated again” as of November 3, 1987, and the doctor ordered “an EMG nerve conduction study... to rule out neurologic involvement and follow up following that with an x-ray of his wrist,” the doctor concluding that Claimant “may have to not just do his heavy duty activities. There is light duty bench work for him that he wants to try to do and we will allow him to try that if he can tolerate it.” (RX 4-2) The doctor released Claimant to return to work on light duty and the diagnosis remained “tendinitis of (right) wrist” as of December 2, 1987. (RX 4-3)

Dr. Infantolino referred Claimant for EMG studies by Dr. William J. Golini, a neurologist, and the doctor, in his December 23, 1987 neurophysiology report (RX 5), opined that the EMG was “abnormal” and demonstrates:

1. A very mild, right-sided carpal tunnel syndrome.

2. A very mild, chronic, right-sided, C 5 radiculopathy.

According to Dr. Golini, “A trial of cervical traction may be helpful.” (RX 5-2)

Claimant was assigned light duty work driving a sweeper and doing some painting for about two or three months in the summer of 1987. In late October of that year he was forced out of the Quonset Point Facility because he was asked to do some overhead welding and because he told the general foreman and building superintendent that such work contravened his restrictions. He was then told to call his doctor to clarify his restrictions. However, the doctor was not available and security personnel escorted him out of the building. Claimant remained out on compensation from October 29, 1987 through November 3, 1987 until Dr. Infantolino issued the appropriate report dated December 2, 1987. (RX 4-3)

After his return to work on permanent light duty restrictions, Claimant was intimidated by his supervisors and after several months he was returned to his regular work as a

welder. He acceded to these requests of his supervisors only because he needed his job. One of his supervisors, Frank Nichols, knew that Claimant's right hand problems continued and were aggravated by picking up heavy material, climbing and crawling around the tanks and welding overhead. Claimant's co-workers also knew about his right hand problems and they would help him by doing the heavier aspects of welding, including carrying his machines from place to place. Claimant's continued work activities aggravated and worsened his right hand problems and his co-workers helped him with his duties until his layoff by the Employer in a bonafide reduction in force due to the defense industry cutbacks beginning in 1993. He was formally laid-off on January 6, 1995 (RX 1-2) and he looked for work but it took him one year to find suitable work within his restrictions. He began work on January 22, 1996 at Cherry Semiconductor Corporation in East Greenwich, Rhode Island. Claimant remarking that he can do this work because this is easier work testing computer chips; he does not have to lift anything and he earns far less than what he did working for the Employer. He began at around $6.00 per hour and was earning $9.21 at the time of the hearing. (TR 56-65, 69; JX 1 at 11-12; CX 8)

Claimant did not see any doctor for his right wrist problems between December 23, 1987 (RX 5) and November 20, 1997 (CX 4), at which time he saw Dr. John W. Goldberg, an orthopedic surgeon, upon referral from Dr. John F. Brody, of the Treatment Center in North Kingstown, Rhode Island, because the doctors told him that his right hand symptoms were due to arthritis, that there was nothing that could be done for him and that he just had to learn how to live with that chronic pain. (TR 65-68; JX 1 at 12-14)

According to Dr. Goldberg's November 20, 1997 report, Claimant "had the onset of symptoms early in November associated with bowling" and there "was a past history of some type of trauma." Claimant's x-rays showed "post traumatic arthritic change of the distal radioulnar joint of the wrist" as well as "some mild thickening of the joint associated with this and mild spur formation." The doctor's impression was "a mild irritation of the extensor tendons running over this area and should resolve with soft tissue strapping and support. For the present he should avoid bowling and direct trauma to the area if possible. He should return for further follow up as instructed if his symptoms fail to resolve." (CX 4)

Claimant also went to see Dr. S. Pearce Browning, III, a specialist in orthopedic surgery and the hands, and the doctor, in his February 11, 1998 report, recommended vascular and electrical studies to further evaluate the etiology of the symptoms. These tests were conducted and Dr. Browning re-

examined Claimant on October 5, 1998 and the doctor reported that Claimant "has a scapholunate dissociation," that the "wrist is sore because since the ligaments are torn, the proximal carpal row spreads at the scapholunate joint and this is why he has pain and dorsiflexion and palmar flexion." Dr. Browning recommended either "a partial wrist fusion or a so-called BLATT procedure...a capsular reefing," the doctor remarking that the BLATT procedure would be more beneficial and would result in an eighteen (18%) percent impairment of the right hand. (CX 6-4) According to Dr. Browning, the scapholunate dissociation can be seen on an x-ray with the hand in "a grasp test," and Dr. Goldberg did not see that scapholunate dissociation because he did not perform the "grasp test." (CX 6-5)

As of February 9, 1999 Dr. Browning referred Claimant to Dr. William A. Wainright, also an orthopedic surgeon, for a second opinion or the propriety of, and to perform that, BLATT procedure. (CX 6-6) That examination took place on February 26, 1999 and Dr. Wainright agreed on the diagnosis of scapholunate instability and the necessity of performing "scaphoid stabilization using a Blatt type capsulodesis." Claimant told the doctor that he "would consider the surgery and call us if he desires surgery." (CX 7)

The Employer referred Claimant for an examination by its medical expert, Dr. Philo F. Willetts, Jr., an orthopedic surgeon, and the doctor, in his May 13, 1999 report (RX 8-7), agreed on the diagnosis of scaphoid lunate carpal instability, the doctor opining that the condition is causally related to his February 2, 1987 work-related injury, that that injury had resulted in a nine (9%) percent permanent partial physical impairment of the right hand, that the Blatt "surgery is elective and not essential," that the "option of surgery is dictated by Mr. Deal's own symptoms, supported by x-rays" and that the "proposed soft tissue stabilization operation of the right wrist could be a reasonable attempt to restore a more comfortable relationship of the carpal bones," that "it is uncertain that this procedure will succeed" and "for that reason, Dr. Wainright has already discussed performing a fusion in the future should the soft tissue stabilization operation not work." (RX 8-9) Dr. Willetts reiterated his opinions at his August 12, 1999 deposition. (RX 9)

Claimant's recovery has been significantly delayed because the Employer would not authorize that surgery until the day before the hearing. (TR 80-81)

Claimant testified that Dr. Browning was the first physician to diagnose his problem correctly by means of the so-called "grasp test," that his attorney requested that the Employer authorize that surgery and that the Employer refused until the

day before the hearing. He wants to have the surgery performed because the pain interferes with and effects his daily activities. All of the doctors agree that the recommended surgery is reasonable. He works as “a lot acceptance tester” at Cherry Semiconductor where he has duties of inspecting and testing computer chips, a job he describes as “very, very easy work.” He began working there on January 22, 1996 and prior to that work, he “sold meat and fish for a while...for a couple of months” in the summer of 1995 strictly on a commission basis. (TR 82-87) Claimant earned wages in that job. (CX 12)

Claimant collected unemployment benefits until “they ran out.” He cannot return to work as a truck driver because he cannot manipulate the steering wheel. Claimant has also injured both of his knees and he has “pulled muscles in (his) back” while working for the Employer sometime in the 1980s and early 1990s. Claimant believes that his bilateral knee problems are due to his “fourteen years of crawling around inside those tanks.” He still occasionally experiences a snapping sensation in his right knee, although the frequency thereof has decreased since he stopped working for the Employer. He reported these injuries at the Yard Hospital and he received conservative treatment for those problems. (JX 1 at 13-24) Claimant’s supplemental testimony is in evidence as RX 16 and his testimony withstood intense cross-examination by Employer’s counsel.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and

his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to

the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his scapholunate dissociation, resulted from working conditions and/or his February 2, 1987 injury at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale**

Shipyards, Inc., 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant sustained a right arm injury in a shipyard accident on February 2, 1987, that the Employer authorized certain medical care and treatment and paid Claimant certain compensation benefits for three days, that Claimant’s right wrist problems were continually misdiagnosed over the years as tendinitis until correctly diagnosed as scapholunate dissociation by Dr. Browning on October 5, 1998 (CX 6-4), that Dr. Willetts (RX 8) and Dr. Wainright (CX 7) have agreed on the diagnosis and that the BLATT procedure is reasonable, that Dr. Browning reiterated his opinions at his September 28, 1999 deposition (CX 9) and that Claimant timely filed for additional benefits (CX 1) once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic

concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8 (a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director,** 449 U.S. 268 (1980)(herein **"Pepco"**). **Pepco**, 449 U.S. at 277, N.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc**., 16 BRBS 168,

172 (1984).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he could not return to work as a welder after January 6, 1995. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability until such time as he found work through his own industrious efforts as “a lot acceptance tester” at Cherry Semiconductor. His wage records are in evidence as CX 8, a document which is now admitted into evidence as Employer has had sufficient time to examine, rebut or contradict such exhibit.

In this proceeding Claimant seeks temporary total disability benefits from January 6, 1995 through January 21, 1996 and temporary partial from January 22, 1996 through February 8, 1999, as well as temporary total from February 9, 1999 through May 2, 2000, and a resumption of temporary partial from May 3, 2000 through the present and continuing for as long as he is eligible therefor. (TR 16-27) These issues were discussed at the April 21, 1999 informal conference. (CX 10, CX 11) The Employer was represented at that conference and those issues are now ripe for adjudication.

Claimant's injury has not become permanent as he requires additional treatment. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said

to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

It is obvious that Claimant's recovery has been significantly delayed by the Employer's failure and delay in authorizing the necessary and reasonable medical care and treatment Claimant requires to restore him to the **status quo ante** he enjoyed prior to his work-related injury.

As Claimant has not yet reached maximum medical improvement, he is not entitled, at this time, to an award of permanent partial disability, pursuant to Section 8(c)(3). Thus, the so-called **Pepco** doctrine, discussed above, does not apply herein.

With reference to Claimant's residual work capacity, it is now well-settled that an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent or temporary partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury

but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his weakened back condition and that his Employer has allowed him to compensate for his physical limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the

fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

The Employer, faced with prospect that the attending physician’s reports in Claimant’s Exhibit #3 clearly indicated that the Claimant had permanent light duty restrictions effective July 1987 and faced with the uncontradicted evidence that Claimant had a permanent condition to his right wrist which necessitated surgical repair and faced with the uncontrovertible evidence that the Employer’s own examining physician had concurred with two physicians who had examined the Claimant that the surgery was reasonable, has now attempted to argue that the Claimant had in fact performed the regular duties as a welder subsequent to his injury of February 1987 as opposed to somehow being left with some restrictions on his activities. In an attempt to rebut the Claimant’s claim, the Employer took the depositions of Francis H. Nichols and Richard Petrucci.

The parties deposed Richard Petrucci on January 11, 2000 (RX 13) and Mr. Petrucci, who has worked for the Employer since November 18, 1974, testified that his current position is as a supervisor and that he has been so employed for twenty-three (23) years, that he supervises twenty-six (26) employees and that he was Claimant's supervisor in February of 1987. Mr. Petrucci could not remember Claimant's right wrist injury but he did "remember the bandage... right on the wrist area." While he did remember Claimant's light duty restrictions, he did not remember the actual work he was performing within those restrictions. Mr. Petrucci also could not remember Claimant being forced out on light duty work; nor could he recall a meeting with the general foreman and building superintendent regarding Claimant's light duty status; nor could he recall Claimant requiring assistance from his co-workers to perform such activities as carrying and setting up his welding

equipment. Mr. Petrucci did testify that he would not work Claimant outside his restrictions and that if Claimant did have a work restriction against overhead welding "based on a medical report that (he) received from the dispensary," he would have found other work for Claimant. According to Mr. Petrucci, Claimant did not provide him "with any formal work restrictions" after his return to work in November of 1987 and after his layoff in January of 1995. Mr. Petrucci denied that any supervisor at the shipyard intimidated or prevented employees from going to the dispensary to seek medical treatment. Mr. Petrucci, who could not recall whether he was Claimant's supervisor in January of 1995, testified that there is no union at the Employer's Quonset Point Facility, that Claimant was laid off in a reduction in force based on "seniority per trade," that a person's restricted duty status was not a factor in that layoff and that "the only thing (he) can remember is about the (right) wristband he had" at that time. (RX 13 at 4-10)

Mr. Petrucci further testified that he could not remember the type of injury Claimant had had that required that bandage and that he did recall Claimant had light duty restrictions but could not recall the specific restrictions. Mr. Petrucci estimated that eight workers out of the twenty-six (26) employees whom he supervises as a welding and ship fitting structural supervisor have work restrictions but he could not recall any of the specific restrictions "without seeing (his) roster." Mr. Petrucci did not know how long he may have been Claimant's supervisor because "(b)ack then people were transferred from crew to crew depending on the workload" and "he may have worked for two or three different supervisors" between February of 1987 and January of 1995. According to Mr. Petrucci, he is "not called to the dispensary" to attend a meeting relating to a worker's restrictions because such a meeting is "entirely between the injured worker, the dispensary and the attending physician." Moreover, work restrictions are received and updated periodically "over the years." (RX 13 at 10-17)

The parties also deposed Francis H. Nichols, Jr. (RX 14) and Mr. Nichols, who has worked for the Employer since 1974, testified that he has worked as a so-called multi-trade technician for four (4) years, that he worked as a structural supervisor from 1975 to 1994 and that he was Claimant's supervisor in the Fall of 1987. While Mr. Nichols could not recall Claimant having a right wrist injury or a right wrist problem, he did recall that Claimant asked his co-workers to help him lift anything over twenty (20) pounds or "anything that is awkward lifting." However, he could not recall Claimant having difficulty carrying his tool bag or welding leads and there is no "informal policy" among shipyard supervisors to assign light duty work to an employee without the knowledge of

the dispensary at the facility, as all light duty is coordinated between the dispensary, the department supervisors and the doctor; if no such work is available, "then they usually put them out on workmen's comp or TDI or whatever." Mr. Nichols could not even recall whether or not Claimant was on official light duty restrictions after the fall of 1987. Nor was there any intimidation from him as a supervisor to prevent any employee from going to the dispensary with any medical problem. All injuries must be reported to the dispensary and all supervisors "have to" support those policy. He could not recall Claimant complaining about his right wrist while he worked for Mr. Nichols and he also could not remember Claimant working at his job as a welder after 1987. (RX 14 at 4-8)

As a multi-trade technician, Mr. Nichols does ship fitting and welding, and he is also trained in other areas such as doing sheet metal or electrical work; he works in building 2003 at the Quonset Point Facility. Mr. Nichols regressed from being a supervisor to that of a multi-trade technician in 1994 "due to lack of work." Mr. Nichols was Claimant's supervisor for "at least a year" in Building 1, Department 913, and "if there was a lack of work ... (he) would ... loan (Claimant) out to other supervisors." Mr. Nichols, who supervised a work crew of "(a)approximately fifteen to twenty," could not recall either the work being done in Building 1 back in 1987 or Claimant's right wrist injury or any type of right wrist problem; nor could he remember Claimant wearing a bandage of any sort on his hand, although "(m)ost likely" he should have been aware of that. Mr. Nichols reiterated his testimony that he did recall Claimant needing some help with his job as a welder. (RX 14 at 8-14)

In view of the foregoing, I find and conclude that there is absolutely no evidence to suggest that Claimant’s restrictions were not permanent in nature. Dr. Infantolino, the Claimant’s attending physician, clearly indicated on two occasions that the Claimant’s restrictions were permanent in nature. Dr. Infantolino first indicated on July 7, 1987 (CX 3) “I think he should be permanently on light duty activities.” Again on November 3, 1987 after making an observation that the Claimant’s wrist was aggravated by his work, Dr. Infantolino went on to indicate that “He may not have to not just do his heavy duty activities. There is light duty bench work for him that he wants to try to do and we will allow him to try that if he can tolerate that.” The Claimant clearly indicated that he could not perform his usual work at Quonset Point as a welder and specifically mentioned several activities that he had problems performing. Welding overhead was a position he said he could not perform and the Claimant credibly testified that because he could not weld overhead he could not qualify as a welder in the State certification program subsequent to his lay off from Quonset Point. The Employer attempted to argue that the

Claimant was not in fact performing light duty work subsequent to the injury of 1987 and has produced Mr. Francis Nichols and Mr. Richard Petrucci, both former supervisors of Claimant. Mr. Nichols and Mr. Petrucci, however, professed to have no recollection or no knowledge of the right wrist injury of 1987. (RX 13, RX 14) However, CX 2 clearly indicates that the Dispensary staff at Electric Boat knew that the Claimant had restrictions. Likewise RX 12 clearly shows that as late as October 28, 1987 that the Employer knew that the Claimant had restrictions and that documents reflect that the Employer was unable to accommodate the Claimant with light duty work. RX 7, the LS-208, clearly reflects that the Employer paid the Claimant benefits because they could not accommodate him with light duty work.

As noted, Claimant testified credibly that he was in effect "forced out of work. I didn't leave on my own." He testified "I was doing work that I wasn't supposed to be doing. I told them I couldn't do it." Question: "And what were you doing?" Answer: "I was welding overhead. And I just I couldn't do it, the sharp pains through my hand." (TR 57)

The Claimant testified that he was "hauled up stairs for a meeting with his supervisor and superintendent." (TR 58) The Claimant testified that they forced him to call his attending physician from his Employer's office. The records clearly indicate that Claimant left work and that he was paid compensation benefits while he was out. RX 3 reflects that the Claimant saw Dr. Infantolino on November 3, 1987 and RX 7 documents that he was paid benefits up to exactly the same day on which he saw his attending physician. On November 3, 1987 the attending physician reiterated his restrictions of July 9, 1987 with the observation that the Claimant could go back to work in a light duty bench capacity, although there was some question in the doctor's mind that the Claimant may not even be able to tolerate light duty bench type of work, **i.e.**, "we will allow him to try that if he can tolerate it."

Where, as in the instant case, and Employer provides Claimant with a light duty job at its facility but then lays off the Claimant for economic reasons, it cannot rely on that job to meet its burden of establishing suitable alternate employment because it has made the alternate work unavailable. **See Norfolk Shipbuilding & Dry Dock Corp. v. Hord**, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999); **Edwards v. Director, OWCP**, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), **cert. denied**, 114 S.Ct. 1539 (1994); **Vasquez v. Continental Maritime of San Francisco, Inc.**, 23 BRBS 428 (1990). Thus, in the case at bar, as Employer provided Claimant with a light duty position and then laid him off, the Claimant sustained a work-related loss in earning capacity subsequent to the lay off. The Claimant credibly testified that he looked for work for approximately a year and

that he subsequently obtained employment at Cherry Semiconductor. The Claimant has indicated that he is making less money than he previously earned at Quonset Point, and such loss is reflected in CX 8.

An unresolved issue at trial, and an attempt to resolve the issue with a subsequent deposition of the Claimant on February 25, 2000 (RX 16) concerned some earnings or earning capacity the Claimant may have realized while working for a local fish and meat company. The Claimant testified that he did not remember the name of the company. (RX 16 at 5) At page 6 of his deposition, he testified that he did not remember ever receiving any payment from the company and testified that he attempted to perform the position every day of the week but did not recall for how long or how many weeks he attempted this. The Claimant provided tax records to the Employer. The tax records apparently showed no earnings from the meat and fish company. On Page 11 of his deposition transcript, the Claimant testified "I didn't make a profit, that's for sure. I think more money came out of my pocket." On questioning from Claimant's counsel, Question: "To the best of your recollection, you may not have made any money, when you factor in possibly one sale, contrasted with the cost of driving the truck around, which you had to bear yourself, is that correct?" Answer: "Right."

Accordingly, in view of the foregoing, I find and conclude that he earned no income as salesman for the meat and fish company. The position is notable, however, in the sense that it clearly shows that the Claimant attempted to secure some work after being laid off from Quonset Point. Claimant testified that he felt he was not suited for continuing on in that employment. "I am not a salesman, so I quit." (RX 16 at 6)

Information obtained from Claimant's present employer, Cherry Semiconductor, indicated that the position the Claimant currently occupies did not exist on the original date of injury, **i.e.**, February 2, 1987. The Court instructed Claimant's counsel to apply the **Richardson v. General Dynamics** analysis to the benefits sought.

The Claimant is seeking temporary total disability benefits subsequent to the lay off on January 5, 1995 until the date he commenced employment at Cherry Semiconductor on January 22, 1996, a total of 52 weeks and 6 days. The base compensation rate is $335.26 a week and would amount to $17,720.89, according to the Claimant.

In addition, Claimant seeks temporary partial disability benefits effective January 22, 1996 based on his wages earned at Cherry Semiconductor.

In 1996 at Cherry Semiconductor, the Claimant earned $14,549.10. Applying the **Richardson** analysis to this the wages would be adjusted to $10,902.25. Subtracting the $10,902.25 from the average weekly wage at Electric Boat yields a difference between the two jobs of $15,320.39. Two-thirds of the difference between the two jobs amounts of $10,213.59, according to Claimant.

In 1997 while employed for Cherry Semiconductor, the Claimant earned $17,354.67. Applying the **Richardson** analysis to these wages requires that they be adjusted down to reflect an earning capacity of $12,441.49. Subtracting $12,441.49 from the average weekly wage at Electric Boat, yields a difference of $13,781.15. Two-thirds of the difference between the two wages amounts to $9,187.43, according to the Claimant.

The Claimant earned for the calendar year 1998, $21,264.55 at Cherry Semiconductor. Applying the **Richardson** analysis to these wages would yield an earning capacity of $14,590.47. Subtracting this from the applicable average weekly wage at Electric Boat yields a difference of $11,630.17. Two-thirds of the difference between the two positions yields an entitlement of $7,553.45, according to the Claimant.

Claimant's wages for 1999 and 2000 are not contained in the record.

Accordingly, in view of the foregoing, I find and conclude that Claimant is entitled to an award of temporary total disability benefits from January 6, 1995 through and including January 21, 1996 and from February 9, 1999 through May 2, 2000, based upon his average weekly wage of $502.90.

I further find and conclude that Claimant is entitled to an award of temporary partial disability benefits for the time period January 22, 1996 through December 31, 1996, an amount totaling $10,213.59; for the year 1997 an award of temporary partial disability benefits totaling $9,187.43; for the year 1998 an award of temporary partial disability benefits totaling $7,553.45. Claimant is entitled to these awards as I find and conclude that Claimant's post-injury wages are representative of his wage-earning capacity and that it was reasonable to utilize the **Richardson** methodology sanctioned by the Benefits Review Board, as discussed above at length.

Claimant is also entitled to an award of temporary partial disability for the years 1999 and 2000, or for at least such time as he is statutorily eligible therefor. Such wage data should be submitted to the District Director and it is anticipated that the Director will be able to resolve those benefits for the remaining time period for which Claimant may be

entitled to temporary partial disability benefits. Otherwise, Claimant may file a **Motion for Modification**, especially as Claimant may soon reach maximum medical improvement. As Claimant's wages for his current employer have fluctuated and as I have been using his actual wages after adjusting for post-injury inflation, I am unable to determine at this time a weekly loss of wage-earning for the years 1999 and 2000.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to additional benefits. (RX 6) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11

BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros**

v. Willamette Western Corp., 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

At the hearing Employer's counsel stated that "we are now conceding on the issue of entitlement to surgery and temporary total only as of the day he has the surgical procedure." (TR 48)

Claimant is seeking medical treatment not only with respect to authorization for the surgery but is also seeking payment of Dr. Browning's bills as they relate to Dr. Browning's correct diagnosis of the Claimant's right wrist problem. Specifically, Dr. Browning's report of October 15, 1998 is the first time during which Dr. Browning correctly diagnosed the nature and extent of the Claimant's right wrist problem as it relates back to the injury of February 2, 1987. Employer's counsel did not concede this issue and the need for surgery until the day before the hearing.

It is axiomatic now that without the intervention of Dr. Browning that the Claimant's right wrist problem would not have been properly diagnosed, the referral to Dr. Wainright would not have been made by Dr. Browning and the surgery by Dr. Wainright would not have occurred. As noted, Dr. Browning testified that he would relate the problem back to the February 2, 1987 injury. (CX 9 at 8)

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on February 4, 1987 and requested appropriate medical care and treatment. However, while the Employer did accept the claim and did authorize certain medical care, the Employer did not authorize the Blatt procedure until the day before the hearing. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, I find and conclude that the Blatt procedure is reasonable surgery to deal with Claimant's right hand problems, that the Employer shall authorize and pay for such surgery and that the surgery shall be

performed as soon as possible as Claimant’s recovery and return to the **status quo ante** has been significantly delayed by the Employer’s failure to authorize such surgery until the day before the hearing.

The Employer has taken the position that Claimant’s post-injury bowling activities and his surf casting constitute intervening events severing the chain of causation between Claimant’s February 2, 1987 work-related injury and his current disability.

Intervening Event

The issue in this case is whether any disability herein is casually related to, and is the natural and unavoidable consequence of, Claimant's work-related accident or whether the Claimant’s bowling constituted an independent and intervening event attributable to Claimant's own intentional or negligent conduct, thus breaking the chain of causality between the work-related injury and any disability he may now be experiencing.

The basic rule of law in "direct and natural consequences" cases is stated in Vol. 1 **Larson's Workmen's Compensation Law** §13.00 at 3-348.91 (1985):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause [event] attributable to claimant's own intentional conduct.
>
> Professor Larson writes at Section 13.11:
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and natural sequelae that flow from the primary injury are compensable . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. (**Id**. at §13.11(a))

This rule is succinctly stated in **Cyr v. Crescent Wharf & Warehouse**, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an

additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." **See also Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mississippi Coast Marine, Inc. v. Bosarge**, 632 F.2d 994 (5th Cir. 981), **modified**, 657 F.2d 665 (5th Cir. 1981); **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981).

Likewise, a state court has held: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. The only medical evidence presented on the issue favors the Claimant." **Christensen v. State Accident Insurance Fund**, 27 Or. App. 595, 557 P.2d 48 (1976).

The case at bar is not a situation in which the initial medical condition itself progresses into complications more serious than the original injury, thus rendering the added complications compensable. **See Andras v. Donovan**, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. **Hayward v. Parsons Hospital**, 32 A.2d 983, 301 N.Y.S.2d 649 (1960). Moreover, the subsequent disability is compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

However, a different question is presented when the triggering activity is itself rash in the light of claimant's knowledge of his condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. **Matherly v. State Accident Insurance Fund**, 28 Or. App. 691, 560 P.2d 682 (1977). The case at bar does not involve a situation in which a weakened body member contributed to a later fall or other injury. **See Leonard v. Arnold**, 218 Va. 210, 237 S.E.2d 97 (1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of negligence or fault. **J.V. Vozzolo, Inc. v. Britton**, 377 F. 2d 144 (D.C. Cir. 1967); **Carabetta v. Industrial Commission**, 12 Ariz. App. 239, 469 P.2d 473 (1970). However, the subsequent consequences are not compensable when the claimant's negligent intentional act broke the chain of

causation. **Sullivan v. B & A Construction, Inc.**, 122 N.Y.S.2d 571, 120 N.E.2d 694 (1954). If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by his own negligence. **Johnnie's Produce Co. v. Benedict & Jordan**, 120 So. 2d 12 (Fla. 1960). Nor is this a case involving a subsequent incident on the way to the doctor's office for treatment of the original work-related accident. **Fitzgibbons v. Clarke**, 205 Minn. 235, 285 N.W.2d 528 (1939); **Laines v. WCAB**, 40 Cal. Comp. Cases 365, 48 Cal. App. 3d 872 (1975). The visit to the doctor was based on the statutory obligation of the employer to furnish, and of the employee to submit to, a medical examination. **See Kearney v. Shattuck**, 12 A.D.2d 678, 207 N.Y.S.2d 722 (1960).

The Benefits Review Board reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house after his injured knee collapsed under him, while attempting to repair his television antenna. Eighteen months earlier this claimant had injured his right knee in a work-related accident, such claimant receiving benefits for his temporary total disability and for a rating of fifteen percent permanent partial disability of the leg. The Board reversed the award for additional compensation resulting from the second injury. **Grumbley v. Eastern Associated Terminals Co.**, 9 BRBS 650 (1979). The Benefits Review Board held, "[U]nder Section 2(2) of the Act, the second injury to be compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, this Administrative Law Judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Furthermore, the Board held, "[c]laimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation." **Grumbley**, **supra**, at 652.

The question now becomes whether or not the Claimant’s bowling activities or surf casting activities constitute a triggering activity that may in and of itself be described as “rash” in light of the claimant’s knowledge of his physical condition.

On the basis of the totality of this closed record, I find and conclude that the question must be answered in the negative for the following reasons.

Claimant credibly testified, on page 66 of the Trial Transcript, that “I always thought it was arthritis. What can you do for arthritis? Take Advil. And all the doctors I went

to, said it was arthritis." This observation by the Claimant is supported by Dr. Infantolino's office notation of June 4, 1987. (CX 3) "The bone scan is noted as showing some arthritic changes especially around the lunate." Again, Dr. John Goldbert who examined the Claimant on November 20, 1997 subsequent to the onset of right wrist discomfort associated with bowling, went on to indicate x-ray's showed "these demonstrate post-traumatic arthritic at the distal radioulnar joint of the wrist."

It is very clear that Claimant understood his right wrist condition to be an arthritic problem. Claimant was advised to take Advil, which he did. The Claimant was at no time advised nor did he have any reason to believe that bowling or fishing could aggravate or magnify the physical problems associated with the work-related injury of February 2, 1987. While it is clear from the record that Claimant was not employed while bowling and surfcasting, it is well-settled that the Claimant need not be totally bed-ridden to be entitled to an award of compensation benefits under the Act. Moreover, there is absolutely no indication in the record that the triggering episode for the surgery ultimately performed in February of 2000 had anything to do with bowling or fishing and Dr. Browning forthrightly opined that Claimant's disability and the resultant surgery are causally related to the work-related injury before me.

Accordingly, in view of the foregoing, I find and conclude that Claimant's bowling and surf casting do not constitute independent and intervening events severing the chain of causality between Claimant's current disability, his need for surgery and the February 2, 1987 shipyard accident.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after April 21, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed with our Docket Clerk within thirty (30) days of receipt of this decision and Employer's counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the

compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from January 6, 1995 through January 21, 1996, and from February 9, 1999 through May 2, 2000, based upon an average weekly wage of $502.90, such compensation, computed in accordance with Section 8(b) of the Act, totals $17,720.89.

2. The Employer shall also pay to Claimant compensation for his temporary partial disability, based upon the difference between his average weekly wage at the time of the injury, $502.90, and his wage-earning capacity after the injury as specifically determined above, as provided by Sections 8(e) and 8(h) of the Act, at the following weekly rates and for these time periods:

a) Commencing on January 22, 1996 and continuing until December 31, 1996, these benefits total $10,213.59;

b) Commencing on January 1, 1997 and continuing until December 31, 1997, these benefits total $9,187.43;

c) Commencing on January 1, 1998 and continuing until December 31, 1998, these benefits total $7,553.45.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his February 2, 1987 injury on and after January 6, 1995. The Employer is also entitled to a credit, pursuant to Section 3(e), for those benefits paid to Claimant from January 29, 1999 through September 24, 1999 with reference to a companion claim identified as OWCP No. 1-142759.

4. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including authorization of and payment of the Blatt procedure, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on April 21, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl